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IN THE

Supreme Court of the United States

JAMES OBERGEFELL, *ET AL.*, *Petitioners*,
v.
RICHARD HODGES, *ET AL.*, *Respondents*.
VALERIE TANCO, *ET AL.*, *Petitioners*,
v.
BILL HASLAM, *ET AL.*, *Respondents*.
APRIL DEBOER, *ET AL.*, *Petitioners*,
v.
RICHARD SNYDER, *ET AL.*, *Respondents*.
GREGORY BOURKE, *ET AL.*, *Petitioners*,
v.
STEVE BESHEAR, *ET AL.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Brief *Amicus Curiae* of Public Advocate of the U.S., Joyce Meyer Ministries, U.S. Justice Foundation, The Lincoln Institute, Abraham Lincoln Foundation, Institute on the Constitution, Conservative Legal Defense and Education Fund, and Pastor Chuck Baldwin in Support of Respondents

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INTEREST OF THE *AMICI CURIAE*[1]

Public Advocate of the United States and The Abraham Lincoln Foundation for Public Policy Research, Inc. are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Joyce Meyer Ministries, U.S. Justice Foundation, The Lincoln Institute for Research and Education, and Conservative Legal Defense and Education Fund are nonprofit educational organizations, exempt from federal income tax under IRC section 501(c)(3). Joyce Meyer Ministries is a church. Institute on the Constitution is an educational organization. Pastor Chuck Baldwin was the Constitution Party candidate for President of the United States in 2008, and leads Liberty Fellowship, Kila, Montana.

The *amici* organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes. Each organization has filed many *amicus curiae* briefs, including 11 in so-called "homosexual rights" cases, which were listed in their

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

amicus curiae brief in DeBoer below (6th Cir., May 14, 2014), at 2-3.[2]

SUMMARY OF ARGUMENT

The constitutional case for same-sex marriage concerns a power not given and a right not enumerated. The power not given is the power of this Court to write its peculiar view of sexual equality into the Constitution. The right not enumerated is the "right" to marry any person of one's choice into the Fourteenth Amendment.

Unable to ground a challenge in the Fourteenth Amendment as written, a false constitutional foundation for homosexual marriage has been fabricated. Sifting through this Court's precedents embracing a fundamental right to marry, the advocates for same-sex marriage have invented, rather than discovered, a "right" to marry a person of one's choice.

Tossing aside America's common law heritage restricting marriage to a covenant union of one male and one female, these same-sex marriage proponents would have this Court pretend that the common law not only did not recognize such marriage, but also did not prohibit such sexual coupling as an infamous crime against nature.

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[2] http://www.lawandfreedom.com/site/constitutional/DeBoer%20Public%20Advocate%20amicus%20brief.pdf

To escape these undeniable historical truths, the same-sex advocates have posited that their right to marry is an evolutionary one, having gradually emerged from the dark ages of the common law into the full bloom of a social science consensus of marriage equality. Invoking the power of this Court to "say what the law is," these advocates would have this Court ignore what it clearly acknowledged in Marbury v. Madison — that the power of judicial review is limited by the words of the Constitution, and by its original purpose — to secure the right of the people to limit future governments by principles designed to be permanent, not to empower this Court to change the Constitution to fit the changing times.

In a vain effort to avoid constitutional illegitimacy, *amicus* Cato Institute insists that the "original meaning" of the equal protection guarantee of the Fourteenth Amendment was not limited by its historic purpose to secure to the newly freed slave class the common law rights and privileges enjoyed by all human beings. Rather, Cato would have this Court ignore the "original understanding" of the equal protection guarantee, and extend its reach to "gay people" without any proof whatsoever that two people living a "gay" lifestyle in the mid-19th Century have been, like blacks, considered "nonpersons," and thus denied their common law rights and privileges to acquire property, make and enforce contracts, sue and be sued, to give evidence, to vote, or to serve on juries.

In recognition that the equal protection guarantee is a weak reed upon which to rest their case, same-sex marriage advocates have resorted to this Court's

decision in Lawrence v. Texas as the fountainhead of their right to marry. But Lawrence was based upon a long line of case precedents protecting a right of privacy which, according to various Justices' assurances, did not implicate the state's interest in preserving traditional marriage. Indeed, it is one thing for this Court to deny to the states, in the name of privacy, the power to prosecute two consenting adults of the same sex for having engaged in the privacy of their home in unlawful sexual activity. It is quite another to require the states to license that behavior as right and good.

Should this Court rule that states must affirmatively sanction same-sex marriage, there will be serious and far-reaching consequences, not the least of which will be major changes in state laws governing domestic relations, inheritance, administration of estates, interests in land, testimonial privileges, and the like. Indeed, in anticipation of such a ruling by this Court, there already have been repercussions adversely impacting the free exercise of religion, freedom of speech, and other constitutionally protected and legitimate business activities. And there is no reason to believe that this Court could confine its ruling to monogamous relationships, for waiting in the wings are a variety of other relationships that will seek the imprimatur of the states.

Inevitably, a ruling in favor of same-sex marriage will usher in an unprecedented coarsening of community moral standards, spawning an aggressive impulse to force the American people not just to tolerate all forms of sexual misbehavior, but to

embrace and encourage pagan practices that threaten to "defile" the land, and risk God's judgment.

ARGUMENT

I. The Fourteenth Amendment Does Not Mandate Homosexual Marriage.

The DeBoer decision upheld traditional marriage against five challenges in four states. Circuit Court Judge Sutton made clear that "[n]obody in this case ... argues that the people who adopted the Fourteenth Amendment understood it to require the States to change the definition of marriage." DeBoer v. Snyder, 772 F.3d 388, 403 (6th Cir. 2014). Indeed, such an argument would have been impossible to support. Homosexual rights simply had nothing to do with the Fourteenth Amendment when ratified in 1868.

Recently, Justice Alito explained that "[s]ame-sex marriage presents a highly emotional ... question ... but not a difficult question of constitutional law." United States v. Windsor, 570 U.S. ___, 133 S.Ct. 2675, 2714 (2013) (Alito, J., dissenting):

> The **Constitution does not guarantee the right** to enter into a same-sex marriage. Indeed, no provision of the Constitution speaks to the issue. It is beyond dispute that the right to same-sex marriage is **not deeply rooted in this Nation's history and tradition**. [*Id.* at 2714-15.]

Therefore, challengers to traditional marriage:

> seek ... not the protection of a deeply rooted right but the recognition of **a very new right**, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. [*Id.* at 2715.]

A. Fabricating a False Foundation for a Fundamental Right.

Unable to ground their challenge in the Fourteenth Amendment as written, the DeBoer Petitioners base their case for homosexual marriage upon an assemblage of fabrications, purportedly derived from this Court's precedents, but without any support in fact or law. Shamelessly, they assert that this Court has already established that "[t]he **right** to marry the **person of one's choice** is a fundamental freedom." Brief for Petitioners ("Pet. Br.") at 1 (emphasis added). In support of this radical claim, they cite Zablocki v. Redhail, 434 U.S. 374, 384 (1978), which plainly states only "that the right to marry is of fundamental importance for all individuals." Petitioners have twisted this limited precedent, first, into a right to marry any "person of one's choice," and then into a "fundamental right."

Not only does Zablocki plainly not say what Petitioners want it to say, their revised version is totally incompatible with the Zablocki court's reliance on Maynard v. Hill, 125 U.S. 190 (1888), which states that "[l]ong ago... the Court characterized marriage as 'the most important relation in life...' and as 'the foundation of the family and of society, without which there would be neither civilization nor progress.'"

Zablocki at 384. This statement obviously applies to traditional marriage, and absolutely provides no support for legal recognition of homosexual marriage. *See* Maynard, 125 U.S. at 210-14. Indeed, it proves just the opposite.

The Maynard court assumed that marriage law was governed by the common law which required consummation between one male and one female.[3] *See id.* at 213. Additionally, the Maynard court made it plain that, "though formed by contract ... the relation of husband and wife, deriv[ed] both its rights and duties from a **source higher** than any contract of which the parties are capable, and as to these **uncontrollable by any contract** which they can make." *Id.* at 212 (emphasis added). "When formed," the Court continued, the relation between husband and wife was "no more a contract than 'fatherhood' or 'sonship' is a contract." *Id.* Instead, marriage "partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy, for the benefit of the community." *Id.* at 213. Thus, only by skipping over Maynard could Petitioners even pretend to claim that Zablocki established the right "to marry the person of one's choice."

To be sure, the DeBoer Petitioners also have offered up Meyer v. Nebraska, 262 U.S. 390, 399

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[3] *See* 1 William Blackstone, Commentaries on the Laws of England, 424 (Univ. Of Chi. Facsimile ed.: 1765). Age was only one of several common law limitations on one's "choice" of a marriage partner. *See id.* at 422-28.

(1923), to support their claim that the right "to marry the person of one's choice" was among the family rights to "'establish a home,' to 'bring up children' and 'to enjoy those **privileges long recognized at common law** as essential to the orderly pursuit of happiness by free' persons." Pet. Br. at 1 (emphasis added). But conspicuously absent from the Meyer inventory of common law privileges is any reference to a right to marry "the person of one's choice." *See id.* at 399. Although the Meyer list included a right "to marry," it is a total fabrication to infer that the Meyer court affirmed, as Petitioners have insisted, a right for a person to marry another person of the same sex. To the contrary, throughout the common law time period referenced in Meyer, sexual relations between men constituted, as Sir William Blackstone declared, "the infamous *crime against nature[,]* a disgrace to human nature," and punishable by death. 4 Blackstone's Commentaries at 215-16.

In addition to this condemnation of "unnatural" sexual coupling, the English common law of marriage exclusively adopted the Biblical matrimonial order. First, the common law limited the relationship to one between "husband and wife," that is, "*baron* and *feme*." I Blackstone's Commentaries at 421. And second, the common law made "voidable" any union between a man and a woman under the "canonical disabilities" of "consanguinity, or relation by blood; and affinity, or relation by marriage." *Id.* at 422. Thus, it is wildly false for Petitioners to presume, as they have, that there is a right to marry any person of one's choice.

In claiming to base their case on the Due Process and Equal Protection Clauses, the DeBoer Petitioners have "deliberately banished the original author[s] [of the Fourteenth Amendment and], usurped [their] place...." E.D. Hirsch, Jr., Validity in Interpretation (Yale Univ. Press 1967), p. 5. The DeBoer Petitioners now ask this Court to take the nation one step further away from the notion of a written constitution, by fundamentally changing the meaning of the text based on the will of a bare majority of five lawyers serving on this Court, rather than complying with the exclusive process for amending the Constitution, as set out in its Article V. Freed from textual constraint, Professor Lino Graglia has observed that:

> [o]ver the past half-century the justices have chosen to make themselves the final lawmakers on most basic issues of domestic social policy in American society. These include issues literally of life and death ... and issues of public morality.... In essence, the Court now performs in the American system of government a role similar to that performed by the Grand Council of Ayatollahs in the Iranian system.... [L. Gralia, "Constitutional Law Without the Constitution: The Supreme Court's Remaking of America," in "A Country I Do Not Recognize" (R. Bork ed., Hoover Press 2005).[4]]

Nearly two decades ago, Justice Scalia warned:

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[4] http://www.hoover.org/sites/default/files/uploads/documents/0817946020_1.pdf.

> [t]his Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that "animosity" toward homosexuality ... is evil.[5] [Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).]

Since Romer, as Justice Scalia predicted, the American people have seen a flurry of judicial opinions with "no foundation in American constitutional law" overturning laws which were "designed to prevent piecemeal deterioration of the sexual morality" desired by the People. These opinions together constitute what he described as "an act, not of judicial judgment, but of political will." *Id.* at 653.

B. An Illegitimate Evolutionary "Right."

The DeBoer Petitioners purport to rest their constitutional case on the "province and duty" of this Court to "say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). *See* Pet. Br. at 28. In total disregard of Marbury, however, Petitioners have made no effort to conform their argument to the constitutional text, despite the fact that the Marbury Court, itself, acknowledged that, in the exercise of its judicial power, the written text governed its

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[5] The current Court is drawn from only three elite law schools: Harvard, Yale, and Columbia. This case could demonstrate that the admissions directors and constitutional law professors of these three schools have more effect on the institution of marriage than do the voters of Michigan.

interpretation, not the other way around. *See id.* at 179-80. By contrast, the DeBoer brief simply announces that:

> Michigan's exclusion of same-sex couples from the freedom to marry denies Petitioners a basic dignity to which they are constitutionally entitled. It is, therefore, "the province and duty" of this Court to hold that the exclusion violates their rights under the Fourteenth Amendment. [Pet. Br. at 29.]

In Petitioners' equal protection section, the DeBoer brief contends that laws exclude same-sex couples from the definition of marriage do not satisfy either this Court's "rational basis" test or its "heightened scrutiny" test. Of course, neither of these tests can be found in the written constitutional text. Rather, both are designed to enable judges to sort through a variety of societal observations about families, substituting "social science" for the rule of law (*see, e.g.*, Pet. Br. at 40), or "minority status" for legal equality (*see, e.g.*, *id.* at 50).

Significantly, Petitioners' due process segment begins not with the text and its historical context, which dates back to the 1215 Magna Carta, but instead with various *dicta* that marriage is a fundamental right, excised from this Court's precedents over the past half century. *See* Pet. Br. at 56-57. Criticizing the court of appeals below for "mischaracteriz[ing] Petitioners' claim as one for 'same-sex marriage,'" and therefore, "not a right 'deeply rooted in our Nation's history and tradition,'"

Petitioners fault the court for "misunderstand[ing] the role of history in due process analysis and ignor[ing] the constitutional significance of our '**emerging awareness**' of how 'laws once thought necessary and proper in fact serve only to oppress.'" Pet. Br. at 57-58 (emphasis added).

History, Petitioners argue, is only the "starting point but not in all cases the ending point of the substantive due process inquiry." *Id.* at 58 (emphasis added). Positing that the claim of right to same-sex marriage is just one more step in an ever-evolving constitutional right of privacy that has not yet reached full bloom, Petitioners urge this Court to adopt their view that the right to same-sex marriage, like the status of women over time, has somehow morphed into an "evolving understanding as to the meaning of equality with respect to marriage." Pet. Br. at 59, n.21.

In their Summary of Argument, the DeBoer Petitioners stake their case on the "overwhelming, well-documented social science consensus ... that child outcomes depend on the quality of parenting ... not the gender of the parents," and thus, that there is no rational basis for denying a marriage license to a same-sex couple. *See* Pet. Br. at 40-42. But adjusting the Constitution to conform with current social science consensus is not the rule of law, much less constitutional law. As this Court ruled in Marbury, the very nature of a written constitution is that it "establish[es] for [the people's] **future** government, ... **principles** ... [that] are deemed fundamental [and] designed to be **permanent**." *Id.* at 176 (emphasis

added). Indeed, the one thing that is self-evident is that social science consensus is not, and has never been, permanent. Prior to 1973, the American Psychiatric Association consensus was that homosexuality was a mental disorder. Now the consensus is that homosexuality is a positive virtue.[6] Who knows what tomorrow may bring. Either way, reliance on social science to provide a foundation for constitutional law builds a house on shifting sands, perverts the rule of law, and seduces judges to function as oracles of self-righteousness, issuing orders requiring all other government officials to act according to their "judicial" opinions.

II. Federal Decisions Compelling Homosexual Marriage Are Deeply Flawed.

In DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), writing for a 2-1 majority, Judge Sutton, *inter alia*, reversed District Judge Friedman's decision, upholding the Michigan constitution and statutory law governing marriage, but he did so almost apologetically, stating:

> the question is **not whether** American law will allow gay couples to marry; it is **when**

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[6] For a discussion of Freud's surprising views on homosexuality, the politicized nature of the positions taken by the American Psychiatric Association, and the sordid role of social science in promoting eugenics and "racial integrity," see Brief *Amicus Curiae* of Public Advocate, *et al.*, in DeBoer, pp. 6-14. http://www.lawandfreedom.com/site/constitutional/DeBoer%20Public%20Advocate%20amicus%20brief.pdf.

> **and how** that will happen.... [DeBoer, 772 F.3d at 395 (emphasis added).]

Although Judge Sutton stated the issue correctly — "Does the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment require States to expand the definition of marriage to include same-sex couples?" — he too ignored the meaning of the Constitutional text, concentrating solely on case precedent which he correctly observed "offers many ways to think about the issue." DeBoer, 772 F.3d at 399.

To be sure, Judge Sutton makes many good points, such as rejecting the charge of animus[7] against people who adhere to traditional marriage, and readily distinguishing this Court's ruling in Loving v. Virginia, 388 U.S. 1 (1967). DeBoer, 772 F.3d at 408-11. Indeed, Judge Sutton observed:

> [a] dose of humility makes us hesitant to condemn as unconstitutionally irrational a view of marriage shared not long ago by every society in the world, shared by most, if not all, of our ancestors, and shared still today by a significant number of the States. [*Id.* at 404.]

Ultimately, however, Judge Sutton's opinion was grounded primarily in the continuing validity of this

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[7] The doctrine of "animus" is among the most powerful invented tools of judicial supremacy over the people, allowing courts to strike down initiatives and referenda which contradict judicial will. *See, e.g.*, DeBoer, 772 F.3d at 408-10.

Court's earlier, and unquestionably correct, 43-year-old ruling in Baker v. Nelson, 409 U.S. 810 (1972), falling short of providing a full-throated defense of traditional marriage of the sort provided by other judges:

- District Judge Martin Feldman's opinion in Robicheaux v. Caldwell, 2 F.Supp.3d 910 (E.D. La. 2014);

- Circuit Judge Kelly's dissents in Kitchen v. Herbert, 755 F.3d 1193, 1230 (10th Cir. 2014) and Bishop v. Smith, 760 F.3d 1070, 1109 (10th Cir. 2014); and

- Circuit Judge Niemeyer's ringing dissent in Bostic v. Schaefer, 760 F.3d 352, 385-98 (4th Cir. 2014).[8]

Other than these few exceptions, federal judges have treated challenges to traditional marriage as an opportunity to exercise raw political power, belying Alexander Hamilton's assurance that the federal judiciary is "the least dangerous [branch] to the political rights of the constitution...." A. Hamilton, Federalist 78. G. Carey & J. McClellan, The Federalist Papers (Liberty Fund, 2001), p. 402. Rather than serving as the protectors of the U.S. Constitution,

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[8] By far the most compelling judicial defense of traditional marriage has come from the Alabama Supreme Court: Ex parte State of Alabama ex rel. Alabama Policy Institute, Alabama Sp. Ct., No. 1140460 (Mar. 3, 2015). http://www.alabamaappellatewatch.com/uploads/file/ 1091320.PDF.

federal courts have wielded the power that Plato thought properly belonged to Philosopher Kings.[9] Hamilton postulated a very different judiciary, one that:

> has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely **judgment**; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments. [The Federalist Papers at 402 (emphasis added).]

Most federal courts reviewing challenges to traditional marriage have issued opinions devoid of faithful constitutional "judgment," and full of personal "will," anticipating that neither the Legislative and Executive Branches of the federal government, nor the States will challenge this Court's opinion, accepting it as the final word on the matter. Indeed, before the case reached this Court, the inferior federal courts felt no constraint to "say what the law is" — confident that, whatever they say, it is the law.

A. Judge Martha Craig Daugherty.

Circuit Judge Daugherty's dissent below is highly personal and political, restating the central issue of the case to be how "the plaintiffs as persons, suffering

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[9] *See generally* Plato, The Republic (B. Jowett, ed., Random House), p. 203.

actual harm," feel. DeBoer, 772 F.3d at 421, 423. Her dissent is grounded in little more than the raw power of 'an independent judiciary" to disregard "legislative will" and "a majority of the electorate," as well as the judiciary's "authority, and indeed the responsibility, to right fundamental wrongs left excused by" the people. *Id.* at 436-37. Judge Daugherty's dissent applies atextual notions of fundamental rights, imputed animus, and balancing tests, an approach where:

> the Constitution is taken simply to prohibit any state or federal action that is not nice. Whatever the text may actually provide, this school transforms it into an engine of political wish-fulfillment. What we don't like in government, the Constitution outlaws. [Craig A. Stern, "Things Not Nice: An Essay on Civil Government," 8 REGENT U.L. REV. 1, 2 (1997).]

B. Judge Bernard Friedman.

Similarly, in the district court below, Judge Friedman waxed poetic and, full of emotion and predilection, chastised the State of Michigan for even deigning to defend the Constitution as it was written:

> [S]tate defendants lost sight of what this case is truly about: **people**. No court record of this proceeding could ever fully convey the personal sacrifice of **these two plaintiffs**.... It is the **Court's fervent hope** that these children will grow up "to understand the integrity and closeness of their own family and its concord with other families in their community and in

> their daily lives....." Today's decision is **a step in that direction**. [DeBoer v. Snyder, 973 F. Supp. 2d 757, 775 (E.D. Mich. 2014) (emphasis added).]

Further, instead of exercising independent judgment, Judge Friedman appears to have had a personal interest in the outcome of the case. The *Detroit Free Press* reported that, in 1995, now U.S. District Judge Judith Levy came to work for Judge Friedman as an openly lesbian law clerk. During her three-year clerkship, Judge Levy had two children by artificial insemination. Judge Friedman reportedly took a special interest in Levy's growing family, and "[h]e became more than a casual friend to them... It's almost like he's their grandfather." B. Dickerson, "What Judge Friedman learned about gay families from a lesbian law clerk," *Detroit Free Press*, Mar. 23, 2014.[10] Indeed, the morning that the DeBoer trial began, Ms. Levy and her children watched from the courtroom gallery and, "[s]hortly after noon, the 15-year-olds slipped into Friedman's chambers for a quiet lunch with the judge and his staff." *Id.* Judge Friedman apparently had no qualms about the appearance of impropriety or the lack of impartiality in meeting in his office during trial with personal friends who were in the class of persons who would be directly affected by his decision. *Id.*

Additionally, Judge Friedman directed the plaintiffs' litigation strategy from the bench. The

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[10] *See* http://www.freep.com/article/20140323/COL04/303230067/judge- bernard-friedman-gay-marriage-michigan.

DeBoer plaintiffs commenced their litigation challenging Michigan's adoption law, but it was Judge Friedman who counseled the challenge to the Michigan Marriage Amendment ("MMA"). DeBoer, 973 F.Supp.2d at 759-60. In so doing, Judge Friedman violated the bedrock principle of *nemo iudex in causa sua*. Then, capping his judicial coup d'etat, he refused to stay his order invalidating the MMA, which he issued on a Friday afternoon at 5:00 p.m., and prevented Michigan officials from obtaining an immediate stay from the Sixth Circuit. Thus, Judge Friedman freed his colleague, Judge Levy, to perform marriages Saturday morning.[11] Abandoning the realm of judicial judgment, Judge Friedman entered the illegitimate realm of personal will, ignoring Chief Justice Marshall's admonition that:

> Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law. [Osborn v. Bank of the United States, 22 U.S. (9 Wheat) 738, 866 (1824).]

Chief Justice Charles Evans Hughes once admitted in private: "At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections." W.O. Douglas, The Court Years

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[11] *See* Associated Press, "Appeals Court Halts Gay Marriages in Michigan" (Mar. 22, 2014), http://news.yahoo.com/appeals-court-halts-gay-marriages-michigan-210343159.html.

(Random House 1980), p. 8. Cases involving so-called "homosexual rights" demonstrate that this distinctly unjudicial practice is not a relic of history, but a present threat to the very survival of the rule of law and the American constitutional republic.

III. CATO'S "ORIGINALIST" CASE FOR SAME-SEX MARRIAGE IS UNTENABLE.

A. Cato's "Original Meaning" Is Designed to Reach a Result Contrary to the Intent of the Framers.

Amicus Cato Institute urges this Court to reject the "original understanding" of those who wrote and ratified the Fourteenth Amendment, in favor of what Cato terms the "original meaning." Brief of *Amici Curiae* Cato Institute, *et al.* in Support of Petitioners ("Cato Br.") at 3. Of course, this begs the question — whose meaning? Obviously this cannot be the meaning given by the people who wrote and ratified the Amendment, since that would be the same as "original understanding."

Readers of poetry may impute meaning to a text — "what does this poem mean to me?" But such an approach to constitutional law would lead to the end of a written constitution, the very purpose of which is to set "permanent" limits on the power of civil governments. *See* Marbury v. Madison, 5 U.S. at 176. Because "the people have an **original right** to establish, for their **future** government, such principles as, in their opinion, shall most conduce to their own happiness," it is their "original understanding," as

revealed by the written words, that determines what the law is. *Id.*

Cato's search for the "original meaning," rather than the people's "original understanding," sanctions a wide-open methodology of interpretation that permits Cato to give the Fourteenth Amendment the "meaning" which leads to a desired outcome. Remarkably, Cato relies on D.C. v. Heller, 554 U.S. 570 (2008), as support for its novel proposition. Cato argues that "[l]aws can and must have consequences beyond those understood or anticipated by the generation of their promulgation." Cato Br. at 4. It is one thing to understand, as a matter of original "principle," the word "arms" in the Second Amendment to include modern rifles as well as colonial muskets, as clearly the framers would have intended. It is quite another to contend that the word "equal" in the Fourteenth Amendment should be read, as a matter of principle, to mandate homosexual marriage, a subject that, on its face, the equal protection guarantee does not address and that its framers would never have intended. *See* DeBoer, 772 F.3d at 403-04. In short, Cato's "original meaning" argument is designed to evade the "original understanding" of those who wrote and ratified the Fourteenth Amendment, imputing **a meaning that they did not and would not have intended** when the Amendment was ratified in 1868.

B. Cato Ignores the Nation's Unique History of Slavery, Inverting the Equal Protection Clause to Apply to All Class Legislation.

From the beginning, the Cato brief untethers its argument from the Fourteenth Amendment text, describing its interest as one "enforcing the age-old principle of 'equality under the law' ... enshrined in the Constitution through the **Fifth** and Fourteenth Amendments." Cato Br. at 1 (emphasis added). But there is no "equal protection" guarantee written in the Fifth Amendment. Instead, this Court grafted one onto the due process guarantee, alleging that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." Bolling v. Sharp, 347 U.S. 497, 500 (1954).

In like manner, Cato reads into the 1791 Fifth Amendment due process guarantee an "age-old principle of 'equality under the law,'" in order to lay a foundation to reject what it deems to be a "narrow, race-based view of the Fourteenth Amendment," and to adopt its preferred broad-based view which would sweep away all "'caste' legislation," not only of "race" and "color" but also of "creed" and "orientation." *See* Cato Br. at 5-6. Indeed, in a rhetorical flourish sweeping aside all textual constraint, Cato opens its Summary of Argument with the inventive claim that:

> [t]he Fourteenth Amendment's Equal Protection Clause establishes a broad assurance of equality for all. It guarantees the same rights and same protection under the law for all men and women of any race,

> whether rich or poor, citizen or alien, **gay or straight.** [Cato Br. at 2 (emphasis added).]

Equally remarkably, Cato claims that this "broad" reading is supported by Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). While Yick Wo may be best known for its atextual proclamation that the right to vote is a "fundamental political right,"[12] that case decidedly does not support Cato's claim of a universal equality of all people. To the contrary, the Yick Wo Court reaffirmed the original narrow meaning of the equal protection guarantee, limited to "race[,] color, ... [and] nationality" (*id.* at 369), an interpretation that had been previously embraced in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71, 125 (1873).

Not only does Cato misuse Yick Wo, but also it omits entirely the clarion call of Justice John Marshall Harlan's dissent in Plessy v. Ferguson, 163 U.S. 537 (1896), which captured the essence of the original equality principle embodied in the Equal Protection guarantee:

> There is no caste here. Our Constitution is **color-blind**.... The law regards **man as man**, and takes no account of his surroundings or of his color.... [*Id.* at 559 (Harlan, J., dissenting) (emphasis added) .]

Indeed, the equal protection guarantee was designed to rid the nation of the pernicious doctrine of

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[12] *See id.* at 370.

inequality sustained by this Court that undergirded the American race-based slavery system,[13] wherein a human being could be "bought and sold, and treated as an ordinary article of merchandise and traffic," and who therefore had "no rights which the white man was bound to respect." *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857). Cato instead would have this Court ignore the specific equality principle ridding the nation of race-based discrimination, absorbing it into a broad-based "principle[] of colonial and Founding Era constitutional theory ... that the rule of law carries with it a presumption of general and equal application."[14] Cato Br. at 6. Ignoring this unimpeachable history of dehumanization of the newly

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[13] *See, e.g.*, Strauder v. West Virginia, 100 U.S. (10 Otto) 303 (1879) ("[The fourteenth amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy.").

[14] In support of its proposition that racial discrimination is only one of a number of examples of unconstitutional class legislation, Cato cites state constitutional provisions such as Article I, Section 20 of the 1857 Oregon Constitution, which reads: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." Or. Const., 1856, art. I, § 20. The Fourteenth Amendment, of course, reads quite differently: "nor shall any State ... deny to any person within its jurisdiction equal protection of the laws." "[T]he difference in the two constitutional texts," writes former Justice of the Oregon Supreme Court, Hans A. Linde, "is not happenstance" explaining "[t]hey were placed in different constitutions at different times by different men to enact different historic concerns into constitutional policy." H. Linde, "Without 'Due Process,'" 49 ORE. L. REV. 125, 141 (1970).

freed slave class, Cato wrongfully attempts to meld "race" and "gay people" into the same "caste" deserving the same "equal protection" of the law. Cato Br. at 17-24. But Cato utterly fails to make its case.

First, Cato has provided no historic parallel between the experience of a homosexual and that of a black person who was bought and sold as merchandise with "no rights which the white man was bound to respect." Rather, while homosexual behavior historically was punishable as a felony, it was rarely prosecuted,[15] not because the "'concept of the homosexual as a distinct category of person' emerged only at the end of the 19th century" (Cato Br. at 18), as Cato would have the American people believe, but because it was "an offense of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out: for, if false, it deserves a punishment inferior only to that of the crime itself." 4 Blackstone's Commentaries at 215. In stark contrast, black people in America were subject to lynching by lawless mobs,[16] which often acted based upon little or no "proof" of any crime. To the contrary, as Blackstone attests, prosecutions for "the infamous crime against nature" demanded that it be "strictly and impartially proved." 4 Blackstone's Commentaries at 215.

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[15] *See* Lawrence v. Texas, 539 U.S. 558, 569 (2003).

[16] *See* N. Johnson, Negroes and the Gun, Prometheus Books (2014).

Second, however badly "homosexuals" have been treated in America, Cato makes no effort to demonstrate that "gay people," like black persons, have been historically treated as nonpersons, denied by law the right to acquire property, to make and enforce contracts, to sue, to give evidence, to vote, or to serve on juries. Nor could such a case be made.

IV. Forcing Homosexual Marriage on the States and on the People Would Do Grave Harm to the Nation.

Just a dozen years ago, Justice Sandra Day O'Connor, concurring specially in Lawrence, assured the States that this Court's decision striking down the Texas sodomy law would not mean that Texas did not have a "legitimate state interest [in] preserving the traditional institution of marriage." *Id.* 539 U.S. at 585 (O'Connor, J., concurring). In his majority opinion, Justice Kennedy likewise observed that Lawrence "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* 539 U.S. at 578. In spite of that, courts across the nation, relying primarily upon Lawrence,[17] have stumbled over each other to be the first to overturn state laws and constitutions affirming the law of the Creator that marriage is limited to the lawful covenant union of one man and one woman as it was from the beginning of time immemorial. *See Genesis* 2:24; *Matthew* 19:4-6.

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[17] Petitioners' brief invokes Lawrence 26 times.

Today, the American people are being told that the institution of marriage cannot constitutionally be based upon a divinely revealed moral foundation, but only according to the secular reasons of men. The nation was not so founded. The Declaration of Independence, the nation's charter, grounded our nation on the Biblical "Laws of Nature and of Nature's God," embracing the principle that all men "are endowed by their Creator with certain unalienable Rights," putting its case for liberty before "the Supreme Judge of the world," and acting in "firm reliance on the protection of divine Providence...." *See, e.g.*, M. Novak, On Two Wings (Encounter: 2002), pp. 5-47. Today's secular message would startle America's founders who drafted and ratified the Constitution. Ben Franklin — perhaps the least religious leader of the founding generation — called the constitutional convention to prayer, because: "God Governs in the affairs of men." Documents Illustrative of the Formation of the Union (Gov't Printing Office, 1927), p. 295. Drawing on the "sacred writings," Franklin continued, "except the Lord build the House they labour in vain that build it," and he then counseled "I firmly believe ... that without His concurring aid we shall succeed in this political building no better, than the Builders of Babel...." *Id.* at 296.

This case before this Court is this nation's tower of Babel. At issue is whether we as a people are going to continue to conform the institution of marriage to the one created and established by God, or instead will reform the most sacred of human institutions into something else chosen by an elite set of jurists. Unlike Lawrence — the impact of which was limited to the

rarely enforced crime of sodomy — any decision to require State recognition of "same-sex marriage" will have repercussions of titanic proportions. To the end that this Court be forewarned,[18] these *amici* submit the following:

A. Wholesale Revision of Every State's Family Law, and Related Matters.

The Alabama Supreme Court decision upholding traditional marriage makes clear the far-ranging implications of changing the meaning of the word:

> "marriage" so as to make it mean [or apply to] something antithetical to that which was intended by the legislature and to the organic purpose of [Alabama law] would appear to require nothing short of striking down that entire statutory scheme. [Ex parte State of Alabama ex rel. Alabama Policy Institute, at 89.]

Indeed, the "entire edifice of family law [would be] wipe[d] away ... with a wave of the judicial wand." *Id.* at 89-90. The laws that would be affected include:

> inheritance ... distribution of estates, ... post-marital support, custodial and other parental rights as to children, adoption of children, dissolution of marriages, testimonial privileges ... certain defenses in the criminal law,

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[18] *Ezekiel* 33:1-7.

> interests in land, the conveyance and recording of such interests ... loss of consortium. [*Id.* at 24.]

B. Closure of Christian and Other Religious Adoption Agencies.

Already, Archbishop Sean P. O'Malley and leaders of Catholic Charities of Boston announced that the agency will end its adoption work, rather than comply with state law requiring homosexual adoption of children.[19] The same has already happened in Chicago.[20] If homosexual marriage were sanctioned, parents would be precluded from using religious agencies to place their children in families who share their religion and values.

C. Preaching Against Homosexuality and Counseling of Homosexuals Likely Would Be Prohibited.

Pastors would be monitored by atheist and liberal groups to ensure that there be no teaching that homosexual behavior is sin. Even websites which offer information about withdrawing from homosexual behavior would be banned as "hate speech." All persons would be prohibited from the free exercise of

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[19] http://www.boston.com/news/local/articles/2006/03/11/catholic_charities_stuns_state_ends_adoptions/.

[20] http://www.patheos.com/blogs/friendlyatheist/2011/05/29/catholic-adoption-agency-will-shut-down-instead-of-letting-gay-couples-adopt/.

religion, including "proselytizing"[21] others that their behavior constitutes sin, but that the penalty for their sins has already been paid through the death, burial, and resurrection of Jesus Christ. I *Cor.* 15:1-4.

In California, it is already a crime to counsel minors with respect to "sexual orientation change efforts," that is, any practices by mental health providers "that seek to change an individual's sexual orientation."[22] New Jersey passed a similar statute, which was recently upheld by the U.S. Court of Appeals for the Third Circuit. *See* King v. Governor of New Jersey, 767 F.3d 216 (3rd Cir. 2014).

D. Churches and Others Would Lose Exemption from Federal Income Tax.

The newly established constitutional right to homosexual marriage would be adjudged more important than the "free exercise" right of para-church ministries, Christian schools and colleges, and even churches. These entities would be placed in jeopardy of losing their federal tax-exempt status. *See* Bob Jones University v. United States, 461 U.S. 573 (1983). Loss of federal income tax-exempt status could lead to loss of contribution income, and forfeiting of church properties to pro-homosexual charities. In addition,

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[21] *See* Employment Division v. Smith, 494 U.S. 872, 877 (1990).

[22] The Ninth Circuit upheld the statute which prohibits the "saying [of] certain words ... [b]y labeling such speech as 'conduct'...." *See* Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014) (O'Scannlain, J., dissenting), *cert. denied*, 134 S.Ct. 2881 (2014).

criminal penalties might be imposed on church leaders. In Idaho, two pastors recently were threatened with fines and jail time unless they performed homosexual marriages at their wedding chapel.[23]

E. Legalization of Multiple-Partner and Incestuous Marriages.

Based on "privacy rights," federal District Judge Clark Waddoups has already invalidated a Utah "cohabitation" law used against religious polygamists, while leaving in place the ban on bigamy, thereby permitting sister wives, with only one wife being the state-recognized lawful wife. Brown v. Buhman, 947 F.Supp.2d 1170 (D.Ut. 2013). Currently, in Arizona and Utah, there are a number of colonies of polygamous families, where the first wife is legally recognized, and the other wives are registered as single mothers with the government as welfare recipients, to the tune of millions of dollars at the taxpayers' expense.[24] Additionally, the door would be wide open for three women[25] or three men[26] to marry

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[23] http://www.frc.org/washingtonupdate/natural-marriage-in-idaho-give-it-arrest.

[24] *See* J. Krakauer, Under the Banner of Heaven (Doubleday: 2003), pp. 12-13.

[25] *See* http://nypost.com/2014/04/23/married-lesbian-threesome-expecting-first-child/.

[26] *See* http://www.dailymail.co.uk/news/article-2972542/They-look-like-new-boy-band-s-world-s-THREE-WAY-sex-marriage-

and, if they can marry, then why not an uncle and a niece as in New York,[27] or a step-brother and sister, as illustrated by Direct TV's new show, "Billy & Billie"?[28]

F. People of Biblical Faith Would be Driven from Public Office.

Requiring homosexual marriage would force state officials to participate in wedding ceremonies which would be sinful for Orthodox Jews, conservative Catholics, and Evangelical Christians. In North Carolina, numerous judges already have resigned to avoid criminal prosecution for refusing to perform gay marriages.[29]

G. A Coarsening of Civil Society.

Most persons have sufficient respect for others that they regulate their sexual behavior to avoid compelling others, especially those who are sensitive or young , to observe their activities. Sadly, there is a significant element among homosexuals who have proven to be wholly insensitive to the sensibilities of others. They refuse to allow Roman Catholics to Celebrate Saint Patrick's Day, without demanding the

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Gay-Thai-men-tie-knot-fairytale-ceremony.html.

[27] *See* http://nypost.com/2014/10/29/new-york-state-blesses-incest-marriage-between-uncle-niece/.

[28] *See* http://billyandbillie.directv.com/#about.

[29] *See* http://christiannewsjournal.com/judges-resign-to-avoid-criminal-prosecution-for-refusing-to-perform-gay-marriages/.

opportunity to celebrate their sexual difference from Catholic doctrine. Gay Pride parades have included nudity, sado-masochism, nuns in drag led by the Sisters of Perpetual Indulgence, and other displays of homosexual behavior designed to shock "straight" people. Indeed, San Francisco's 2012 ban on public nudity is waived for the San Francisco Pride Parade.[30] Television no doubt will become even more pro-homosexual, making it more difficult for persons adhering to traditional values to live their lives and raise their children in an increasingly debased culture.

H. Mandates on Businesses to Cater to Homosexual Couples.

Using statutes originally and primarily designed to protect blacks from discrimination,[31] activist homosexuals have targeted bakers, photographers, and florists, seeking to force all of them to promote a marriage that they believe to be immoral. In Washington state, a judge ruled that a florist violated the state's anti-discrimination laws when she referred a longtime customer to another florist for the wedding flowers for his homosexual marriage.[32] In New York, a husband and wife shut the doors to their business

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[30] *See* http://americansfortruth.com/2012/12/07/san-franciscos-public-nudity-ban-will-still-allow-lots-of-public-nudity-at-homosexual-events/.

[31] J. Gottry & G. Gottry, "Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech," 64 VAND. L. REV. 961, 965 (2011).

[32] http://www.cnn.com/2015/02/20/living/stutzman-florist-gay/.

hosting weddings on their family farm, after a court fined them $13,000 for refusing to host gay marriages in their home.[33] In Colorado, a baker faced jail time[34] and stopped baking wedding cakes entirely, after a court ruled that he discriminated against a gay couple when he refused to bake them a cake for their wedding.[35] In Oregon, a court found similarly against another baker, and he may be forced to pay a homosexual couple up to $150,000 as penalty.[36] The New Mexico Supreme Court held that a photographer violated the state's anti-discrimination statutes by refusing to photograph a gay wedding.[37] Newspapers likely will be forced to publish homosexual wedding announcements, in violation of their existing editorial control over what they publish.

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[33] http://news.yahoo.com/couple-fined-refusing-host-gay-wedding-shuts-down- 193206210.html.

[34] http://www.breitbart.com/big-government/2013/12/12/christian-baker-willing-to-go-to-jail-for-declining-gay-wedding-cake/.

[35] http://www.huffingtonpost.com/2014/06/03/jack-phillips-masterpiece-cakeshop- n 5438726.html. *See* opinion at https://www.aclu.org/sites/default/files/assets/initial_decision_case_no._cr_2013-0008.pdf.

[36] http://www.usatoday.com/story/news/2015/02/02/bakery-same-sex-oregon- fined-wedding-cake/22771685/.

[37] Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013).

I. Professional Licensing Requirements to Serve Homosexual Couples.

In this brave, new, homosexual-friendly world, every licensed professional would be required to embrace the new orthodoxy, to bow down to the idol of "non-discrimination," or be cast out of his profession. People who first claimed only to only want tolerance of their behavior will allow no toleration for other views. Will a physician be forced to perform an artificial insemination for a lesbian couple?[38] Will a lawyer be forced to take a case defending gay marriage? Lawyers are already losing their "traditional prerogative to exercise absolute discretion in the selection of clients...." R. Beg, "The Lawyer's License to Discriminate Revoked: How a Dentist Put Teeth In New York's Anti-Discrimination Disciplinary Rule," 64 ALBANY L. REV. 154 (2000). Provisions designed to advance the homosexual agenda have been incorporated into many state ethics codes. In California, for example, it is unethical to "discriminat[e] on the basis of ... sexual orientation [in] employment ... or [client] representation...." State Bar of California, Rules of Professional Conduct: Rule 2-400B.[39]

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[38] *See* North Coast Women's Care Medical Group, Inc. v. Superior Court, 44 Cal. 4th 1145 (Cal. 2008).

[39] http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule2400.aspx.

J. Undermining the Created Male-Female Order.

The Holy Scriptures reveal that God created mankind, male and female, in the image of God. *Genesis* 1:27; *Matthew* 19:4-6. Homosexual sex and homosexual marriage are a repudiation of God's created order.[40] Nature itself reveals that God fashioned the male penis and the female vulva/vagina as complementary sex organs. One homosexual testified to this obvious truth when he reported that homosexual sex is "a poor substitute for intercourse with a woman...." [41]

In stark contrast to the created order, today one's "sex" is defined as "a person's biological status,"[42] while "gender" is "a person's private sense and subjective experience,"[43] and "sexual orientation" a person's "emotional and sexual attraction to a particular sex or

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[40] In Robert Bolt's play "A Man for All Seasons" Sir Thomas More asked "if [the world] is round, will the King's command flatten it?" Likewise here, if God created us male and female and marriage as a covenant union between a husband and a wife, will an order by this Court undo it?

[41] K. Jay and A. Young, The Gay Report: Lesbians and Gay Men Speak Out About Sexual Experiences & Lifestyles (Summit Books: 1979), p. 477

[42] http://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf.

[43] "Gender Identity Development," Boundless Psychology, Jul. 3, 2014, https://www.boundless.com/psychology/textbooks/boundless-psychology-textbook/gender-and-sexuality-15/introduction-to-gender-and-sexuality-75/gender-identity-development-297-12832/.

gender."[44] In short, "sex" is who you are, "gender" is how you feel, and "sexual orientation" is who you like.

Not too long ago, sexual orientation was delineated into heterosexual (straight) and homosexual (gay/lesbian or "queer"). To that was added "bisexual" (attracted to both men and women), "pansexual" or "omnisexual" (attraction to all genders), and "asexual" (not attracted to anyone).[45] In 2014, Facebook added more than 50 gender options to its users' profiles and now allows custom options.[46] In order to be considered "tolerant" and "understanding," one presumably must have a Ph.D. in gender studies. In the mid-1980's, and for a time, "LGB" was settled upon. Then, by the mid-1990s, "LGBT" was used. But even that did not prove inclusive enough, prompting group after group to be "outraged" and to demand "full inclusion" of all. The current accepted vernacular is said to be "LGBPTTQQIIAA+," standing for "lesbian, gay, bisexual, transgender, transsexual, queer, questioning, intersex, intergender, asexual, ally and beyond."[47] Indeed, some consider pedophilia to be a legitimate

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[44] http://www.apa.org/topics/lgbt/orientation.aspx.

[45] *See* https://lgbtq.unc.edu/resources/exploring-identities/bisexual-pansexual-identities.

[46] *See* http://rt.com/usa/236283-facebook-gender-custom-choice/.

[47] *See* http://msmagazine.com/blog/2013/10/01/lgbpttqqiiaa-how-we- got-here-from-gay/.

sexual orientation,[48] returning us to the pagan pederasty of ancient Greece.[49] Requiring homosexual marriage will contribute mightily to the sexual confusion of the nation, sexualizing children and young adults, encouraging them to experiment with sin.

K. Loss of Liberty.

John Adams warned "Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."[50] Today, "the distinctive features of modern European political thought, including ... its particular notion of individual rights ... and its embrace of religious toleration," are attributed to the "process of secularization" — but that view "puts things almost exactly backward." E. Nelson, The Hebrew Republic: Jewish Sources and the Transformation of European Political Thought (HARVARD UNIV. PRESS, 2010), pp. 1-2. In fact, rejection of Judeo-Christian thought inevitably leads to a neopagan world view. In support of striking down laws against abortion, Justice Blackmun pointed out:

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[48] *See* http://latimesblogs.latimes.com/lanow/2013/01/many-experts- now-view-pedophilia-as-a-sexual-orientation-google- hangout.html.

[49] *See, e.g.*, http://theol.eldoc.ub.rug.nl/FILES/root/1989/120/1bremmer.pdf.

[50] J. Adams, "Message to the Officers of the First Brigade of the Third Division of the militia of Massachusetts" (Oct. 11, 1798). http://www.beliefnet.com/resourcelib/docs/115/Message from John Adams to the Officers of the First Brigade 1.html.

> abortion was practiced in Greek times as well as in the Roman era, and ... "it was resorted to without scruple".... Greek and Roman law afforded little protection to the unborn.... Ancient religion did not bar abortion. [Roe v. Wade, 410 U.S. 114, 130 (1973).]

Like abortion, homosexuality constitutes:

> a reversion to pagan ways of thinking. Most obviously, homosexuality was accepted among the ancient Greeks and supplies the premise of Platonic discussions about the nature of love. Similar views prevailed in Babylon, Egypt, and imperial Rome. All of this was unequivocally condemned by the religion of the Bible. As cogently argued by Dennis Prager,[51] the current effort to relegitimize homosexuality is thus an attempt to turn Western culture back to pagan attitudes and behaviors. [M.S. Evans, The Theme is Freedom: Religion, Politics, and the American Tradition (Regnery Publishing, 1994), p. 128.]

Such pagan ways of thinking did not respect individual rights, diversity, or tolerance, or envision government to be limited in power, but rather were reflected in acceptance of abortion, infanticide, "exposure" (abandonment) of children, widespread slavery, and governments with totalitarian powers, and even the

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[51] D. Prager, Homosexuality, the Bible, and Us — a Jewish Perspective, THE PUBLIC INTEREST, Summer 1993.

divinity of political leaders. *Id.* at 138. The choice for the country is clear:

> [t]he classical way of thinking led inexorably to untrammeled power in the state, and to subjugation of the individual. The biblical model leads to limitations on that power, and hence to freedom. [*Id.* at 135.]

L. God's Judgment on the Nation.

Should the Court require the States and the People to "ritualize" sodomite behavior[52] by government issuance of a state marriage license, it could bring God's judgment on the Nation. Holy Scripture attests that homosexual behavior and other sexual perversions violate the law of the land, and when the land is "defiled," the people have been cast out of their homes. *See Leviticus* 18:22, 24-30. Although some would assert that these rules apply only to the theocracy of ancient Israel, the Apostle Peter rejects that view: "For if God ... turning the cities of Sodom and Gomorrha into ashes condemned them with an overthrow, making them an ensample unto those that after should live ungodly." 2 *Peter* 2:4-6. The continuing application of this Levitical prohibition is confirmed by the Book of Jude: "Even as Sodom and Gomorrha, and the cities about them in like manner, giving themselves over to fornication, and going after strange flesh, are set forth for an example, suffering

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[52] 1 *Kings* 14:24.

the vengeance of eternal fire." Jude 7 (emphasis added).

CONCLUSION

Whatever justification any judge may believe compels a State to define marriage to include same-sex couples, it is not found in the Constitution, nor is it based in any constitutional principle. For any judge to require a State to define marriage to include same-sex couples is an usurpation of authority that he does not have under the laws of man or God, and is thus illegal.

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